

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DALE E. DENOYER,) 8:14CV309
)
Petitioner,)
)
v.) **MEMORANDUM
AND ORDER**
)
STATE OF NEBRASKA,)
NEBRASKA ATTORNEY)
GENERAL, and FRED BRITTEN,)
Warden,)
)
Respondents.)

This matter is before the court on Petitioner Dale DeNoyer's Motion to Reconsider (Filing No. [28](#)) the court's Memorandum and Order dated March 30, 2015 (Filing No. [26](#)). In that order, the court dismissed DeNoyer's Petition for Writ of Habeas Corpus because it failed to state a claim for relief. In addition, the court denied a certificate of appealability.

DeNoyer argues that, in the court's discussion of whether or not a certificate of appealability should issue in this case, the court improperly characterized DeNoyer's habeas corpus petition as one brought pursuant to [28 U.S.C. § 2254](#). DeNoyer is correct. Because DeNoyer is a pretrial detainee, habeas corpus jurisdiction arises under [28 U.S.C. § 2241\(c\)\(3\)](#) in this case.

DeNoyer also argues the court improperly denied a certificate of appealability because one is not required to appeal the denial of a petition brought pursuant to § 2241. On this issue, DeNoyer is incorrect. [Title 28 U.S.C. § 2253](#) provides that:

- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]

28 U.S.C. § 2253(c)(1)(A). See also *Hoffler v. Bezio*, 726 F.3d 144, 154 (2nd Cir. 2013) (state prisoner must procure a certificate of appealability to appeal a denial of habeas relief sought pursuant to 29 U.S.C. § 2241); *Evans v. Circuit Court*, 569 F.3d 665, 666-67 (7th Cir. 2009) (same); *Wilson v. Belleque*, 554 F.3d 816, 824-25 (9th Cir. 2009) (same); *United States v. Cepero*, 224 F.3d 256, 264 (3d Cir. 2000) (same), abrogated on other grounds by *Gonzalez v. Thaler*, 132 S. Ct. at 647 n. 1; *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) (same); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998) (same).

Thus, while it is correct that the court improperly characterized DeNoyer's petition as one arising under 28 U.S.C. § 2254 in its discussion of whether a certificate of appealability should issue, the result is the same. DeNoyer may not appeal the adverse ruling in this case unless he is granted a certificate of appealability, see 28 U.S.C. § 2253(c)(1)(A), and a certificate of appealability cannot be granted unless he "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). DeNoyer has not made a substantial showing of the denial of a constitutional right in this case.

IT IS THEREFORE ORDERED that: DeNoyer's Motion to Reconsider (Filing No. 28) is denied.

DATED this 9th day of April, 2015.

BY THE COURT:

Richard G. Kopf
Senior United States District Judge

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